BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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[redacted]

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IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. G(W)31227-41F BY T-L)
IRRIGATION COMPANY)

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A Proposal for Decision recommending denial of the Application was issued on July 31, 1990. Timely request for oral argument and written exceptions were received from Applicant, T-L Irrigation Company. Objector Montana Power Company (MPC) and Objectors James Allen Daems and Helen Joy Daems submitted timely briefs opposing the exceptions.

Oral argument on the exceptions was held before the Assistant Administrator of the Water Resources Division on December 14, 1990 at Bozeman, Montana. Russ McElyea presented argument for the Applicant. Holly J. Franz argued for MPC, and Matt Williams argued for James and Helen Daems. Don P. Mellon appeared pro se.

The Applicant proposes to divert part of a water right out of the Blaine Spring Creek drainage and use the right to supplement irrigation on greatly increased acreage in a different drainage. See Proposed Findings of Fact Nos. 5 and 6. The burden was on the Applicant to establish how transferring water out of the Blaine Spring Creek drainage would not adversely affect other users of Blaine Spring Creek water and how using the water on the increased acreage would not increase consumption.

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See Mont. Code Ann. § 85-2-402(2)(1989) and discussion with Proposed Conclusion of Law No. 7. The Proposal for Decision would deny the Application because the Applicant failed to establish these factors. See Proposed Conclusions of Law Nos. 7 and 8. Upon review of the record and after considering the parties' arguments, the Department agrees with the Hearing Examiner.

Applicant's Exceptions primarily target the Hearing Examiner's inquiry into historic use patterns of the underlying water right. Applicant complains that the Hearing Examiner's findings with respect to historic use would reduce their water right. Using jurisdictional and res judicata arguments, the Applicant contends that the Department must accept their pre-1973 rights as claimed before the Water Court and recognized in previous decrees. However, the Proposal for Decision assumes the validity of Applicant's claim and accepts the quantity and priority as stated in the claim and previous decrees. See Proposed Findings of Fact No. 5, 6, 9 & 10. The Hearing Examiner's findings and conclusions concerning historic use patterns are not contrary to Applicant's statement of claim. Consequently, Applicant's arguments are moot.

Applicant, however, also argues that the Department is precluded from inquiring into parameters of water rights not addressed in prior decrees or claims. Precedent, however, is otherwise. See Quigley v. McIntosh, 110 Mont 495, 103 P.2d 1067 (1940). In Quigley, like here, an appropriator wanted to change

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the place of use of a previously decreed right. The decree, like here, stated the flow but excluded the pattern of use. In discussing the absence of a period of use and a specification of the acreage to be irrigated in the decree, the Supreme Court stated:

> But in any event, the court's failure to include either of those two elements could not serve to expand the early water rights beyond the beneficial uses claimed and proved, or to remove the well-established limitation of the appropriator's right to waters actually taken and beneficially applied. So to hold would be to revolutionize the water right laws in practically every instance where rights have been decreed in the usual manner. . . . The mere fact that the decree awarding a water right in miner's inches or other flow measurement fails to describe the acreage actually irrigated or the time of flow or the volume of water actually used, cannot serve to remove all limitations upon its use in point of time or volume, and thus substantially to expand the early appropriations, to the detriment of subsequent appropriators.

Id. at 509-510. Quigley was affirmed and the historic beneficial use limitation on previously decreed rights stated and confirmed by the Montana Supreme Court more recently as follows:

> The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as to the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. Thus an owner may have a decreed right to a certain number of miner's inches of water; or a statutory appropriative right to a stated amount; or a right depending on mere use; or even a prescriptive right to a stated amount; nonetheless, the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use.

McDonald v. State, 220 Mont. 519, 722 P. 2d. 598 (1986). In other words, incomplete descriptions of water rights in prior decrees do not provide a license to expand historic use patterns to the detriment of other users.

Decreed and claimed water rights are limited by historic beneficial use and the Department must examine historic use to ensure that prior appropriations are not enlarged to the detriment of other appropriators. See discussion with Proposed Conclusion of Law No. 6. The Department is obligated to protect other water users in change applications. Mont. Code Ann. § 85-2-402(1989). The Department will not abdicate its statutory responsibilities by failing to make the necessary inquiries here.

The Applicant purports to make eleven exceptions to the Proposed Findings of Fact. However, only three findings of fact, Nos. 10, 11 & 12, are specifically excepted to. Applicant's exceptions to the Proposed Findings of Fact are directed at the Hearing Examiner's discussion supporting the findings and primarily attack the weight and credibility given to particular pieces or segments of evidence and testimony. In particular, the Applicant argues that the opinions and conclusion asserted by its expert should be afforded more weight. However, it is the Hearing Examiner's province to judge the weight and credibility of the testimony adduced at the hearing. See Sharkey v. Atlantic Richfield Co., 239 Mont. 159, 777 P.2d 335, 327 (1989). Moreover, the Department agrees with the Hearing Examiner that the Applicant's expert's conclusions and opinions relevant to

adverse effect were based on erroneous assumptions. See discussion with Proposed Finding of Fact No. 12. The Proposed Findings are supported by competent substantial evidence in the complete record. Therefore, the findings will be adopted as proposed. See Mont. Code Ann. § 2-4-621(3)(1989).

The Applicant also excepts to Proposed Conclusions of Law 6, 7 & 8. The arguments offered in Applicant's brief to support these specific objections have already been addressed in this opinion. Moreover, the Applicant's arguments are fairly and completely answered by the Hearing Examiner's reasoned opinions which accompany Proposed Conclusions of Law 6 & 7. The Department agrees with the law as stated and applied by the Proposed Conclusions of Law and will adopt the Conclusions.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision, and incorporates them herein by reference.

ORDER

Application for Change of Appropriation Water Right No. G(W)31227 by T-L Irrigation Company is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

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Dated this 5 day of March, 1991.

Laurence Siroky
Assistant Administrator
Water Resources Division
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406)444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 6th day of March, 1991 as follows:

T-L Irrigation Company
d/b/a/ Bar 7 Ranch
P.O. Box 1047
Hastings, NE 68901

Combs Cattle Company
P.O. Box 577
Ennis, MT 59729

Montana Power Company
40 East Broadway
Butte, MT 59701

John Branger, Manager
Robbie Stock Ranch
513 Varney Road
Ennis, MT 59729

William Russell McElyea
Moore, O'Connell, Refling
and Moon
P.O. Box 1288
Bozeman, MT 59771-1288

Shining Mountains Owners
Association
P.O. Box 452
Ennis, MT 59729

Holly J. Franz
Attorney at Law
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Helena, MT 59624

James H. Morrow
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Don P. Mellon
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Helen Joy Daems
c/o Jim Daems
26 Gravely Range Road
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Cindy G. Campbell
Hearings Unit Secretary

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G(W)31227-41F BY T-L IRRIGATION COMPANY	))))	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 29 and 30, 1990 in Bozeman, Montana.

Applicant T-L Irrigation Company, doing business as Bar 7 Ranch, appeared at the hearing by and through counsel Perry J. Moore and Russell McElyea.

Gerald L. Westesen, Professor of Civil and Agricultural Engineering at Montana State University, appeared as a witness for the Applicant.

Boyd VanFleet, ranch manager for Bar 7 Ranch, appeared as a witness for the Applicant.

"Glen" Daniel Schultz, resident of Shining Mountains Subdivision, and Tom Orcutt, a member of the Shining Mountains Owners Association, appeared as witnesses for the Applicant.

Objectors James A. Daems and Helen Joy Daems appeared at the hearing in person and by and through counsel Matthew W. Williams.

Tom Lehman and James Foster appeared as witnesses for Objectors Daems.

Objector Montana Power Company appeared at the hearing by

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and through counsel Holly J. Franz.

Larry H. Gruel, Director of Business Management for Montana Power Company's generation and transmission department, appeared as a witness for Objector Montana Power Company (hereafter, "MPC").

Kenneth W. Salo, a consulting engineer with Morrison Maierle, CSSA Inc. appeared as a witness for MPC.

Objector Don P. Mellon appeared at the hearing pro se.

The Estate of Joseph Robbie was represented as an interested party at the hearing by counsel James Morrow.

Scott Compton, Field Manager of the Bozeman Water Resources Field Office, and Jan Mack, New Appropriations Specialist with the Bozeman office, appeared at the hearing as staff witnesses for the Department of Natural Resources and Conservation (hereafter, the "Department").

EXHIBITS

The Applicant offered nine exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 is an enlargement of the Water Resources Survey map for the area in question in this matter. The exhibit has an overlay marked with the historic place of irrigation (green-hatched area) and the proposed areas of irrigation pursuant to the change (orange-hatched area for T-L Irrigation), as well as various water courses and ditches. Exhibit 1 was accepted for demonstrative purposes.

Applicant's Exhibit 2 is a photocopy of Statement of Claim

of Existing Water Right No. 31227, filed by Shining Mountains Owners Association (hereafter, "SMOA") (5 pages). A copy of SMOA's protective covenants (2 pages), and a copy of a 1963 Decree on Blaine Spring Creek by the Fifth Judicial District (10 pages) are attached to the Statement of Claim.

Applicant's Exhibit 3 is a certified photocopy of a 1987 warranty deed to real property conveyed to T-L Irrigation Company by Bar 7 Company (4 pages).

Applicant's Exhibit 4 is a certified photocopy of a 1989 warranty deed to real property conveyed to T-L Irrigation Company by George B. and Margaret E. Anderson (1 page).

Applicant's Exhibit 5 is a Soil Conservation Survey aerial photograph of the area under discussion in this matter.

Applicant's Exhibit 6 is a photocopy of the resume of Dr. Gerald L. Westesen (8 pages), offered to substantiate Dr. Westesen's expertise in agricultural engineering.

Applicant's Exhibit 7 is a photocopy of a report prepared by Dr. Westesen for introduction in this matter, entitled "Net Depletion and Site Investigation for T-L Irrigation Change Application" (8 pages plus title page).

Applicant's Exhibit 8 is a computer printout of well logs for the area, provided to Dr. Westesen by the Montana School of Mines.

Applicant's Exhibit 9 is a letter from Montana Water Court Clerk of Court specifying the filings which the Montana Water Court has received regarding Claim No. 41F-W-031227-00.

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Applicant's Exhibits 1 through 5 and 7 through 9 were accepted for the record without objection, subject to cross-examination. Applicant's Exhibit 6 was objected to as being repetitious, since the parties stipulated as to Dr. Westesen's expertise. The objection was overruled by the Hearing Examiner, and the exhibit accepted, so that the record may accurately reflect the basis of the witness's expertise.

Objector Montana Power Company (MPC) offered seventeen exhibits for inclusion in the record in this matter:

MPC Exhibit 1 consists of photocopies of six Statements of Claim of Existing Water Rights (Nos. 031228-41F, 031229-41F, 031230-41F, 031231-41F, 133906-41F, and 133907-41F) filed by Shining Mountains Owners Association (total of 28 pages).

MPC Exhibit 2 is a photocopy of a sketch of the Missouri River and its tributaries above Great Falls, and shows the general locations of several MPC power generation stations.

MPC Exhibit 3 is a photocopy of a five-page summary of MPC's water right claims in the Upper Missouri River Basin.

MPC Exhibit 4 consists of four photocopied pages of graphs representing daily average flows at a USGS gauge immediately below Marony Dam, for the years 1960 through 1977.

MPC Exhibit 5 is a photocopy of a one-page "summary of periods during which flows at the USGS gage on the Missouri River below Morony Dam exceeded 10,000 cfs for five or more consecutive days", 1960-1988.

MPC Exhibit 6 is a photocopy of a one-page report comparing

spills at Canyon Ferry and Cochrane dams during the 1976 water year.

MPC Exhibit 7 is a photocopy of a one-page chart of MPC's reservoir capacity for each MPC power plant. The exhibit also shows each facilities' elevation versus storage capacity, and specifies plant characteristics such as spillway capacity and power generation capabilities.

MPC Exhibit 8 is a copy of the resume of Kenneth W. Salo, consulting engineer and chief water resources engineer for Morrison-Maierle, CSSA Inc. (2 pages).

MPC Exhibit 9 is a photocopy of the report prepared by Kenneth Salo for introduction in this matter, entitled "Report on Net Depletion Investigation for T-L Irrigation Company Change Application, File No. 67000-028.443" (15 pages plus cover page).

MPC Exhibit 10 is a page containing two photographs, one of the Flow of Blaine Spring Creek at the Ennis Fish Hatchery stream gauging weir, and one of the discharge from the siphon across Wigwam Creek which conveys water to the Bar 7 Ranch. Objector MPC stipulated that the photographs show stream conditions on the date they were taken (July 7, 1989) and are not intended to represent flow and/or conditions on the creek in general.

"MPC Exhibit 11" is an exact duplicate of MPC Exhibit 10, apparently introduced inadvertently by Objector MPC. Therefore, this exhibit will be removed from the record as being repetitious.

MPC Exhibit 12 is a generalized diagram showing return flow

mechanics. Objector MPC stipulated that the exhibit is not intended to reflect the geology of the area in question in this matter.

MPC Exhibit 13 consists of photocopies of the title page and two pages (143 and 154) of a 1968 USGS report entitled "Mineral and Water Resources of Montana" (3 pages).

MPC Exhibit 14 is a generalized diagram of the geology underlying the site. In response to objections by the Applicant that the diagram was not specifically supported by the witness's geologic information (MPC Exhibit 13), MPC witness Salo crossed out that portion of the diagram specifying "solid bedrock". The Exhibit was accepted for the limited purpose of illustrating Objector MPC's arguments concerning the geology of the area.

MPC Exhibit 15 is a photocopy of a bar graph labeled "SMOA Water Right, Comparison of Historic and Proposed Use". The Applicant objected to this exhibit on the basis that Objector MPC's assessment of historic water use, as reflected by the exhibit, is based on irrigation of a grass/hay crop, whereas the Applicant argues that the comparison must reflect the maximum amount of water ever used and that the comparison crop must be alfalfa. The parties agreed that the testimony reflected that both crops in varying ratios had been grown, and the exhibit therefore was accepted as indicative of Objector MPC's position on the issue.

MPC Exhibit 16 consists of photocopies of the cover page and of Table 6.5, "Recommended Design Efficiencies for Contour Ditch

Irrigation", from the Montana Irrigation Guide (2 pages).

MPC Exhibit 17 is a photocopy of a "spread sheet analysis", showing the possible range of values for net depletion for the SMOA water right.

Objector MPC's exhibits were accepted for the record, with the discussed objections and limitations.

Objectors Daems offered six exhibits for inclusion in the record in this matter:

Daems Exhibit 1 is a photocopy of the protective covenants established by Shining Mountains Owners Association (2 pages).

Daems Exhibit 2 is a photocopy of the Montana Irrigation Guide "Estimated Monthly and Seasonal Consumptive Use" for Madison County (2 pages).

No Exhibits numbered 3,4, or 5 were offered by Objectors Daems for the record.

Daems Exhibit 6 is a photocopy of Statement of Claim for Existing Water Right for Stockwater No. 136415-41F, filed by James Daems for appropriations from Blaine Spring Creek (3 pages).

Daems Exhibit 7 is a photocopy of Statement of Claim for Existing Water Right for Irrigation No. 141897-41F, filed by James Daems for appropriations from Blaine Spring Creek (8 pages).

Daems Exhibit 8 is a photocopy of Statement of Claim for Existing Water Right for Irrigation No. 141896-41F, filed by James Daems for appropriations from Blaine Spring Creek (14

pages).

Daems Exhibit 9 is a photocopy of Provisional Permit No. 20486-s41F, granted to Helen Joy Daems with a priority date of October 2, 1978, for 2.41 cfs up to 96.4 acre-feet of water per year from Blaine Spring Creek (5 pages, including photocopies of the verification report and forms).

Daems Exhibits 1,2,6,7,8, and 9 were offered and accepted for the record without objection.

Objector Mellon offered two exhibits for inclusion in the record:

Mellon Exhibit 1 is a map created by overlapping several plat maps showing the Shining Mountains Subdivision, and was used by all of the parties for demonstrative purposes at the hearing. Objector Mellon marked the main canal running north to south through the subdivision on the map in green, and marked three possible water take-out points.

Mellon Exhibit 2 consists of photocopies of the Department verification abstracts for Statement of Claim for Existing Water Right No. 31227-41F (cover sheet plus 11 pages).

Mellon Exhibits 1 and 2 were accepted for the record without objection.

Robbie Ranches (The Estate of Joseph Robbie) offered one exhibit for inclusion in the record:

Robbie Exhibit 1 is a photocopy of a deed conveying real property from the California Land and Investment Company to Don P. and Marsha D. Mellon. The exhibit was accepted for the record

without objection.

The Department did not offer any exhibits for inclusion in the record. The Department file was made available for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

The record in this matter closed upon receipt of all briefs timely filed by the parties prior to April 17, 1990.

PRELIMINARY MATTERS

I. The Applicant moved to dismiss the objection of Don Mellon in this matter, alleging that Mr. Mellon has no recognized interest in the matter which would give him standing. The Hearing Examiner denied the Applicant's motion and allowed Don Mellon to participate as an objector at the hearing, while limiting the scope of Objector Mellon's argument on the issue of ownership of the water right sought to be changed to an offer of proof on the issue. The Applicant renewed its Motion to Dismiss, arguing that the Hearing Examiner's decision left Mr. Mellon without standing to participate in the contested case procedure.

The Hearing Examiner hereby reiterates her position that the statutory language of §85-2-308, MCA is broad enough to allow Mr. Mellon status as an objector and the right to participate in the hearing process.

The Applicant's position at the hearing that §85-2-308 (contained as it is in the part of the code dealing with new appropriations) may not be applied to change applications, is not

persuasive. Adherence to this position would deprive persons potentially affected by change proceedings of access to the administrative process, since §85-2-308 is the only code section which sets forth the right of objection. Clearly this result is not contemplated by statute (§85-2-308 cross-references §85-2-402, indicating that the objection procedure is intended to apply to change applications as well as applications for new use), nor did the Applicant seriously attempt to argue that the objection process does not apply in change proceedings. Rather, the Applicant's apparent stance is that, since §85-2-402 sets forth the criteria in change proceedings, it acts to limit or delineate the content of §85-2-308 with regard to the bases of objection in a change proceeding. (Statement of counsel for Applicant, Applicant's post-trial brief.) In other words, the Applicant argues that a person may not object on the basis of, or argue, any of the bases for objection specified in §85-2-308 that are not specifically relevant to §85-2-402. This position also is not persuasive.

Section 85-2-308, MCA provides objection procedures for both new use and change applications. The procedure, and the bases for objection, are not differentiated on the basis of the type of objection. This suggests that §85-2-308 is intended to provide a "door" into the administrative forum by which any person filing an objection which falls within the very broad parameters set by §85-2-308 may enter into the process. Such a policy encourages an equitable outcome by providing a relatively open forum for

participation by persons with relevant concerns who might otherwise be excluded because they did not word their objection with sufficient specificity or the relevancy of whose concerns is not apparent until the Department has been able to obtain fuller information concerning the proposed change than is available at the initial stages of the process. Once in the process, the objectors (as well as the applicant) are required to provide information which is relevant to the specific criteria before their arguments will be accorded any weight. However, an objector is entitled to maintain his standing, whether or not his testimony and evidence is used by the Hearing Examiner in this or her decision. In the present matter, Don Mellon's objection will not be dismissed. The Hearing Examiner notes for the record that the Applicant in this matter is not adversely affected by this ruling, since a review of the record indicates that the information which Mr. Mellon provided by testimony, evidence, and cross-examination is intended to substantiate his contentions concerning water use on his property and does not have any bearing or effect on the decision in this matter.

II. For obvious reasons, the Department will not (and legally cannot) grant a change authorization for a water right to a person or party who holds no possessory interest in that water right. Therefore, if the Applicant in the present matter does not have such an interest, the Application must of necessity be denied. On the present matter, the objectors have raised two separate challenges to ownership: Objectors Daems and MPC argue

that there has been a post-1973 abandonment of the water right, and Objector Mellon argues that the Applicant's predecessor in interest did not own the water right and therefore could not sell it to the Applicants nor allow it to be changed.

A. On the issue of post-1973 abandonment of the water right, Objectors Daems and MPC argue that the Department has the jurisdiction to make such a determination, and that the evidence indicates that it should find at least partial abandonment of the underlying water right in this matter. (Statements of counsel of Objectors Daems and MPC, Objectors Daems' post-trial brief.)[1] The Objectors concede that the Department does not have the authority to "adjudicate the abandonment of the underlying interests for the purposes of terminating all diversions pursuant to its terms" (Post-Trail Brief, page 13), but assert that the Department may and should find that the claimed water right does not exist.

On many previous occasions, the Department has asserted its authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding whether the criteria of §85-2-402, MCA have been met. Since the Department is unable to ascertain what effects a proposed change might have on other appropriators (and objectors are unable to

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[1]The Objectors do not allege, nor does the Department assert, any jurisdiction to determine abandonment of pre-1973 water rights (See §85-2-216 and §85-2-309(2), MCA; Objector Daems' post-trial brief (page 13).

argue potential effects to their rights) without knowing the relevant characteristics of the historic use, the Department will not grant a change authorization if an applicant is unable to "flesh out" a claimed right sufficiently that the objections and criteria may be adequately addressed. See, e.g., In the Matter of the Application for Change of Appropriation Water Right No. G40605-41O by Crumpled Horn (Final Order February 13, 1987); In the Matter of Application for Change of Appropriation Water Right No. 58133-s41O by Lloyd Debruycker (Final Order November 4, 1988). The result is not a modification of the underlying water right, since the right remains as claimed or as modified in the adjudication process, and may be utilized as claimed. To this extent, the Hearing Examiner agrees with Objectors Daems' argument that a review of the underlying water right is within the purview of the Department. The Hearings Examiner is unwilling to take the position that the Department can and should make an affirmative finding of abandonment in the present case, however.

A water right which allegedly was abandoned prior to 1973 clearly is within the jurisdiction of the water court, and the issue may be certified to the water court by the Department. (See §85-2-216, §85-2-309(2), MCA.) A water right which is abandoned after the issuance of a final decree determining the right clearly is within the jurisdiction of the Department (See §85-2-404, MCA.) What is not clear is the proper forum for determining post-1973 abandonment of a pre-1973 water right prior

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to the completion of adjudication.

Even assuming arguendo that the Department could properly claim jurisdiction, however, the facts in the present case do not support a clear finding of abandonment. The use of the underlying water right, while sporadic at best since 1973, clearly exceeds the complete non-use of water in those cases where courts have found abandonment. See e.g., 79 Ranch, Inc. v. Pitsch, 656 P2d 215 (1983). Even by the lowered threshold employed recently for finding abandonment, the water right in question does not appear to have been abandoned: the non-use has not (as of yet) been lengthy, nor has it combined with an intent to abandon, since SMOA has actively pursued maintenance of the water right by filing and defending the claim, and by intermittent use.

Arguments that the right has been partially abandoned are somewhat more persuasive, since the right has been used only infrequently since 1973, and then was used on a limited area. However, it is possible that the entire flow rate was utilized (see Finding of Fact 10), and also possible that the entire volume was used. Therefore, there is no basis for making a determination of abandonment, even if the Department chose to assert jurisdiction on this issue. However, the decision reached in this matter precludes the necessity of reaching the issue of abandonment, and obviates any adverse effect to the Objectors that might be caused by the Hearing Examiner's refusal to find the underlying water right abandoned.

B. Objector Mellon argues that SMOA, the Applicant's predecessor in interest, did not own the underlying water right and therefore could not legally sell or change the right. The Hearing Examiner limited the scope of the Objector's argument on this issue at the hearing to an offer or proof. The Objector excepted to this decision, as did counsel for Objectors Daems, and requested that the ownership question be certified to the Water Court.

Objector Mellon's position, as set forth in his offer of proof, is that the restrictive covenants wherein the Shining Mountains Owners Association purports to retain all water rights appurtenant to the subdivision in the association rather than the individual landowners are insufficient to convey real property interest, and that ownership of the water right in question (and all other appurtenant rights) therefore remains in the owners of the real property which comprises the historic place of use. Mr. Mellon argues that the ownership issue should be decided prior to a Department determination in the present change application, since a decision that the ownership does not reside in the Applicant would render further action by the Department unnecessary. To this end, the Objector has made a motion to certify the issue of ownership to the Water Court.

The Hearing Examiner hereby denies Objector Mellon's Motion to Certify on the basis that certification of the water right ownership issue in this matter would not be appropriate. There is no evidence or record which suggests that the Water Court is

the appropriate forum for determining the issues of ownership which have been raised by the parties in this matter. The ownership issues here do not concern "the determination and interpretation of existing water rights" (see §85-2-216,MCA). Even though the underlying water right is a claimed pre-1973 use right, it is interpretation of the real property transactions conducted by SMOA that is in question, not the underlying water right.

The claimed Water Right No. 31227-41F was duly filed by SMOA in the ongoing adjudication. Neither Objector Mellon nor the other landowners claimed water rights based on the same appropriation, nor raised objections to the content of the claim. There does not appear to be any disagreement between Mellon, SMOA, and the Applicants that the claimed use right exists, historically has been appurtenant to the general area of property now occupied by the Shining Mountains Subdivision, and therefore correctly was filed upon in the adjudication. Rather the disagreement involves the legality of the methods utilized to retain ownership of the water right in SMOA.

Objector Mellon argues that the language in the "protective covenants" imposed on Shining Mountains property owners which purports to reserve all surface water rights for SMOA is insufficient to convey ownership, while the Applicant and SMOA argue that the water rights were properly conveyed. The Objector argues that SMOA's subsequent sale of the water right in this matter breaches SMOA's obligations and runs contrary to the

purposes of the protective covenants, while SMOA and the Applicant deny any such conflict exists. See Protective Covenants, Applicant's Exhibit 2. Clearly, these issues concern real property covenances, contractual obligations, and possibly breach of fiduciary duties, rather than adjudication of the underlying right. As such, they belong in the district court forum rather than the Water Court.

For the same reasons, the Department cannot accept jurisdiction on the ownership issue. The Department has no jurisdiction to determine whether the covenants were sufficient to convey ownership of the water right or whether SMOA exceeded its authority by selling the right to the Applicant. At most, the Department may make a preliminary determination as to whether the Applicant shows sufficient ownership interest to allow the Department to go forward with the change process. On the present matter, the Applicant is the successor in interest to the owner of record of the water right, whose claim has been recognized thus far in the adjudication process. See §85-2-227, MCA. No court has ruled to the contrary on the ownership issue, nor is the matter pending in court at this time. Therefore, there is a prima facie showing of ownership by the Applicant, and the Department has sufficient basis for proceeding with the present application. Due to the decision reached in this matter, the Objectors cannot argue that the Department's refusal to accept jurisdiction of the ownership issue has harmed them.

III. Objector Mellon alleges that the administrative process

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in this matter is flawed by inadequate notice: he claims that the individual landowners who reside in Shining Mountains Subdivision were entitled to individual notice of the Application. (See §85-2-307, MCA.) However, a review of the record in this matter indicates that the notice was adequate.

Section 85-2-307(1)(b) requires the Department to serve individual notice of the pertinent portions of an application upon "an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation." The Department therefore sends individual notices to permit holders and applicants and to appropriators (holders of pre-1973 priority water rights) on the source who may be affected. The Department's records of owners of pre-1973 rights consist of listings of the water rights claimed in the adjudication process, which lists the claimants' names and addresses. Therefore, individual notice of an application is sent to the person and address set forth in the claim; in the present instance, to persons and entities claiming water rights from the source Blaine Spring Creek (Warm Springs Creek), including SMOA, but not to the Objector or other subdivision property owners who were not claimants.

The Objector does not contest the fact that SMOA is the named claimant. However, he argues that the list of property owners which SMOA submitted with its claim (see Mellon Exhibit 2, pages 5,6, and 7) put the Department on notice that the

individual owners had an interest in the rights claimed by SMOA, and that the Department should have mailed individual notices to all owners. The Hearing Examiner does not agree that a listing of subdivision residents attached to a water rights claim is sufficient to trigger a duty to notify each person.

As a practical matter, it is not possible for the Department to list all property owners who may have an interest in a particular water right. A look at the case at hand, wherein the subdivision in this matter has hundreds of lots, indicates the impossibility of keeping records of ownership current and of mailing individual notices to each person. Even if it was possible to undertake such mailings, however, there is no reason for doing so in those instances where the water right is claimed in the name of a governing body or association. In absence of evidence to the contrary, the Department has the right to assume that the named entity represents the interests of the property owners in regard to the claimed right.

In the present matter, the Department duly sent individual notice to SMOA as owner of record, and also fulfilled §85-2-307 requirements of public notice by publishing the pertinent portions of the application in a newspaper of general circulation in the area of the source. The fact that the published notice resulted in Mr. Mellon filing an objection to the application in this matter supports a finding that the Department's notice in this matter was adequate with regard to the Objector.

Counsel for the Estate of Joseph Robbie also argued

insufficient notice in this matter, and that lack of due notice -- in conjunction with Robbie's alleged position as an "indispensable party" (see Robbie Reply Brief pp. 1-2) -- require that the Estate of Joseph Robbie be given the standing of an Objector in this matter. However, as the Hearing Examiner stated at the hearing, the Department records indicate the Department sent individual notice to Joseph Robbie at the last address of record, as well as fulfilling the requirements of public notice as discussed above. The fact that the same individual and public notice process resulted in Robbie objecting to the related application by Combs Cattle Company supports a determination that the Department's notice in this matter was adequate. The Hearing Examiner hereby reaffirms her denial of Robbie's motion to intercede as an Objector in the present matter. Whether a party not an Objector, but granted status as an interested party, may file briefs is not an issue which it is necessary to reach, since the briefs did not raise any arguments of substance beyond those already made part of the record through their inclusion in the oral argument portion of the record in this matter.

IV. A great deal of evidence and testimony was introduced on the issue of whether the Shining Mountains Subdivision lot owned by Objector Mellon was part of the original place of use for Water Right No. 31227-41F, presumably to develop a record in case of appeal. However, based on the Hearing Examiner's determination that the Department does not have jurisdiction to decide the underlying issue of ownership of the water right, this

evidence will not be reviewed in this Proposal.

V. Several issues of fact and law not addressed in this Proposal were raised either directly or indirectly in the course of the hearing in this matter; such issues as return flows running into ditches which intersect Blaine Spring Creek and the various parties' claims thereto, the entitlement of the parties to claimed waste water, the location and adequacy of measuring devices, record-keeping by the various appropriators, the historic use of the other water rights appurtenant to the place of use, and the Applicant's failure to remove any acreage from the claimed place of use for this portion of the total water right. Due to the decision made in this matter, these issues have not been reached. However, should this decision be modified or reversed, these and other issues may have to be addressed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-402, MCA states in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department."

2. Application for Change of Appropriation Water Right No. 31227-41F was duly filed with the Department of Natural Resources

and Conservation on January 5, 1989 at 4:05 p.m.

3. The pertinent portions of the Application were published in the Madisonian, a newspaper of general circulation in the area of the source, on February 23, 1989.

4. The source of water for claimed Water Right No. 31227-41F is Blaine Spring Creek, a tributary of the Madison River.

5. Statement of Claim for Existing Water Rights for Irrigation No. 31227-41F was filed by Shining Mountains Owners Association on September 8, 1981, claiming 250 miner's inches up to 1,000 acre-feet of water per year for irrigation of 490 acres. In the Water Court verification procedure, the entire flow rate and volume for the claimed water right were recognized, but the acreage was reduced to 279 acres. This acreage includes all of the bench land where Shining Mountains Subdivision presently is located, within a few feet of the rim, as well as acreage to the west of the diversion ditch. (Testimony of Scott Compton; see Applicant's Exhibits 1 and 5, and Department file.)

The historic place of use as verified includes 75 acres in the S½NW¼ of Section 19, 60 acres in the N½SW¼ of Section 19, 10 acres in the NW¼SE¼ of Section 19, 35 acres in the W½NE¼ of Section 19, and 20 acres in the S½NE¼NW¼ of Section 19, Township 07 South, Range 01 West, as well as 10 acres in the N½SE¼ of Section 24, 20 acres in the SE¼NE¼ of Section 24, 20 acres in the S½SW¼NE¼ of Section 24, 25 acres in the SE¼NW¼ of Section 24, and 4 acres in the N½NE¼SW¼ of Section 24, Township 07 South, Range 02 West, all legals located in Madison County, Montana (see

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Mellon Exhibit 2). The priority date for the claim is September 19, 1880. The period of appropriation for the claimed right is April 1 through September 30 of each year.

6. SMOA, as the named owner of claimed Water Right No. 31227-41F (See Applicant's Exhibit 2), has agreed to transfer a portion of the specified water right to T-L Irrigation Company. By means of the present Application for Change, T-L Irrigation (dba Bar 7 Ranch) seeks to use the transferred portion of 100 miner's inches up to 400 acre-feet of water on 6.5 acres in the SE¼SE¼ of Section 26 and 194 acres in Section 25, Township 07 South, Range 02 West, and on 52 acres in the S½S½ of Section 19, 268 acres in Section 30, and 150 acres in Section 31, Township 07 South, Range 01 West, for supplemental irrigation of a total of 670.5 acres. The Applicant T-L Irrigation also intends to use the transferred portion on 12.5 acres (two parcels) in the SW¼ of Section 25 and 16 acres in the SE¼ of Section 26, Township 07 South, Range 02 West, and on 16 acres in the SW¼ of Section 29, 25 acres in the SE¼SE¼ of Section 30, and 1 acre in the NE¼NE¼ of Section 31, Township 07 South, Range 01 West for new irrigation of a total of 70.5 acres.

As specified in the Application, the past place of use for Water Right No. 31227-41F will remain unchanged. See Application Attachment 4(B)2.

7. Objector James A. Daems is owner of record of three claimed water rights on Blaine Spring Creek: Claim No. 136415-41F for 120 miner's inches up to 11 acre-feet of water per year

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for stockwatering, with a priority date of April, 1883 and a claimed period of use of January 1 through December 31 of each year; Claim No. 141896-41F for 120 miner's inches up to 1098 acre-feet of water per year for irrigation, with a claimed priority date of April 1, 1883 and a claimed period of use of May 1 through November 1 of each year; and Claim No. 141897-41F for 192 miner's inches up to 1756.8 acre-feet of water per year for stockwatering, with a claimed priority date of Spring, 1938 and a claimed period of use of May 1 through November 1 of each year. The point of diversion for all three claims is the SE¼SW¼SE¼ of Section 18, Township 07 South, Range 01 West, Madison County, Montana. (See Daems Exhibits 6,7 and 8.)

Objector Helen Joy Daems is owner of record of Water Right Permit No. 20486-s41F for 2.41 cfs up to 96.4 acre-feet of water per year from Blaine Spring Creek, with a priority date of October 2, 1978 and a period of use of April 1 through October 31 of each year. The point of diversion is the SE¼SW¼SE¼ of Section 18, Township 07 South, Range 01 West, Madison County, Montana. (See Daems Exhibit 9.)

Robbie Ranches, aka The Estate of Joseph Robbie, is the owner of record of several claimed water rights on Blaine Spring Creek (see Department records); however, the individual rights were not introduced or discussed at the hearing in this matter.

Objector Montana Power Company has filed massive amounts of claimed water rights on the Madison River, to which Blaine Spring Creek is tributary, and on the Missouri River, to which the

Madison is tributary, (see MPC Exhibit 3). These rights claim water for power production, head, and storage, with priority dates ranging from 1892 to 1968.

8. Statement of Claim No. 31227-41F lists two points of diversion from Blaine Spring Creek, one in the NE¼SE¼SW¼ of Section 13 and one in the SE¼NE¼NW¼ of Section 24, Township 07 South, Range 02 West. (See Applicant's Exhibit 2.) The former point of diversion is located at or near the source of Blaine Spring Creek, above the Ennis National Fish Hatchery, while the latter point of diversion is located downstream from the hatchery. (See Applicant's Exhibit 1.) The Applicant in this matter proposes to divert its portion (100 miner's inches up to 400 acre-feet of water) of Right No. 31227-41F through the diversion point in the SE¼NE¼NW¼ of Section 24, Township 07 South, Range 02 West. (See Application.) From there, the water would be conveyed by the same ditch (referred to as the "main ditch" or "North-South ditch") which serviced SMOA property in the past. However, the water now would be conveyed past the former SMOA take-out points to the south edge of the bench, across Wigwam Creek by means of a siphon already in place, and then into a ditch which transverses the proposed places of use to an ending point at Applicant's "Pivot No. 1" in Section 31, Township 07 South, Range 01 West. (Testimony of Boyd VanFleet; Applicant's Exhibit 1. The proposed conveyance route is marked as a dark blue line on Applicant's Exhibit 1.) Boyd VanFleet testified that the existing siphon and the ditch below it have

the capacity to hold the additional 100 miner's inches of flow.

Water from the ditch would be distributed over the proposed place of use by pump stations 1, 2, and 2A. These pump stations have electric pumps which supply water to the Applicant's sprinkler systems. (Testimony of VanFleet.) No testimony was given regarding the other pump stations marked on Applicant's Exhibit 1.

The Applicant currently is running six center pivots, which have been installed at the rate of approximately two pivots per year for the last three years. (Testimony of VanFleet.) The water right which is the subject of the present Application would be used as supplemental water for four of these pivots (see Applicant's Exhibit 1, Department file), as well as in wheel lines that cover the other acreage specified for supplemental irrigation. The water would also be used on 70.5 acres of new irrigation, probably by means of flood irrigation. (Testimony of VanFleet.) The Applicant intends to grow hay and possibly grain.

Boyd VanFleet testified that the Applicant is planning on using the water right for approximately two and a half months each summer, starting in late May, but that the length of use will depend on the particular conditions of each year. He testified that the Applicant wishes to retain the option of "pre-irrigating" in April, and might irrigate until late September if necessary to cover the lands. Mr. VanFleet stated that the water will be shut off during the irrigation season only if ditch repairs are needed. Applicant's witness Westesen testified that

it is his understanding the entire place of use would not be irrigated for the full 150-day season, but that the Applicant would be rotating the irrigation.

Mr. VanFleet further stated that the water would be measured by Parshall flumes; one located immediately below the point of diversion and one just above the siphon crossing Wigwam Creek.

9. The Applicant already has Blaine Spring Creek water rights for approximately 550 miner's inches of water, which are utilized on the acreage for which the present right would provide supplemental water. The Applicant wants the present right to give better coverage of the acreage, as well as to provide more water for new use. (Testimony of VanFleet.)

The Blaine Spring Creek rights (Claim No. 132632-41F with a 1895 priority date for 250 miner's inches; and Claim No. 132638-41F with an 1880 priority date for 300 miner's inches) are diverted from Blaine Spring Creek at the same point of diversion as that requested in the present Application. The Applicant further holds a Permit to Appropriate Water with a 1981 priority date for 186.8 miner's inches of "waste water from decreed rights from Blaine Spring Creek" with the same point of diversion. (See Permit No. 18903-s41F; Department file.)

10. It is not possible from the record in this matter to reconstruct the historic pattern of use for claimed Water Right No. 31227-41F with any exactitude. The water right has been utilized somewhat differently by every irrigator of record, apparently in conjunction with other water rights. However, the

record taken as a whole indicates that the water right most likely was used for a certain length of time, then shut off, then use resumed, and the pattern repeated over the irrigation season, rather than used at full flow rate constantly for 150 days as Applicant's witness Dr. Westeson suggests.

Water Right No. 31227-41F is part of a larger water right with an 1880 priority date. The portion of the water right which now comprises claimed Water Right No. 31227-41F was sold to one of the Applicant's predecessors in interest in 1963. (See Applicant's Exhibit 2.) Therefore, historic use on the area claimed as the place of use for this right began in 1963. (The claimed place of use, which the Applicant agrees should be amended to 279 acres of land, covered approximately the bench land now occupied by Shining Mountains Subdivision, and hereafter will be referred to as the "SMOA bench".)

Subsequent to Applicant's predecessor Lehman Ranch Company obtaining the water right in 1963, it was used on the SMOA bench by Objector Daems' witnesses Tom Lehman and Jim Foster. Mr. Lehman testified that formerly he was part owner of the SMOA bench area and managed the property from 1960 to 1967. He testified that he irrigated the whole bench land (see area marked in black by Mr. Lehman on Applicant's Exhibit 5 to depict 1963 irrigation). When the Blaine Spring Creek water right was purchased in 1963, Mr. Lehman testified, he put a center ditch through from the north-south ditch and expanded irrigation to new acreage east of the ditch. (See red markings on Applicant's

Exhibit 5.) Mr. Lehman testified that he also used Cold Spring and Wigwam Creek water on the bench lands with the Wigwam Creek water being used on the portion of the bench near Wigwam Creek.

James Foster, another part owner of SMOA bench land from 1957 to 1972, testified that he used an "upper ditch" west of the main ditch (as opposed to the "center ditch" located east of the main ditch) to flood-irrigate lands west of the main ditch. He testified that he used a 50-h.p. pump and six 4" wheel lines to irrigate the acreage east of the main ditch. Mr. Foster stated that he would normally irrigate in "sets" of ten days on, five days off, beginning in the middle of May in an average irrigation season. He stated that normally there would be one "set" in May, two sets in June, one set in July (allowing time for haying), and a couple sets in August.

Mr. Foster irrigated crops on the bench which changed from 50% alfalfa/50% grass in 1957 to 5% alfalfa/95% grass in 1973, using Cold Spring Creek and Wigwam Creek water in addition to the water right under review herein, as well as other Blaine Spring Creek rights. (See MPC Exhibit 1.) Mr. Foster stated that he was not sure which Blaine Spring Creek water right was being used at any given time. Objector Daems testified that he was able to use water from Blaine Spring Creek for his junior rights during the "frequent" periods of time water was not being used.

Subsequent to the land on the bench being purchased by Shining Mountains (approximately 1972), there was intermittent irrigation of the historic place of use. Objector James Daems

testified that a Mr. Savin had attempted to irrigate the bench with a small sprinkler system in the early 1970's and that Arnie Rosedal had irrigated land east of the main ditch in the late 1970's with a small portable pump and one handline beginning in June and not continuing very long. Glen Schultz, a homeowner in the Shining Mountains Subdivision and a member of the SMOA Board of Directors, stated that the historic place of use was irrigated "continuously" by Arnie Rosdahl for two summers beginning in 1978 when Mr. Schultz arrived, then flood irrigated in later years. Boyd VanFleet testified that he flood-irrigated the SMOA bench with the water right in question for approximately three years in the mid-1980's. He testified that water records "might or might not" show how long irrigation took place during these years.[2]

The testimony of these witnesses, which is the only evidence on record as to the pattern of use for the claimed water right, contradicts Dr. Gerald Westesen's postulation that the water right would have been used at full flow rate continuously for a 150-day irrigation period. (See Applicant's Exhibit 7; discussion infra.) The testimony of the Objector's witnesses is further buttressed -- and that of Dr. Westesen further rebutted -- on the issue of pattern of use by the claim itself. Claim No. 31227-41F claims a total volume of 1,000 acre-feet of water per

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[2]As relevant as the testimony of Mr. Schultz and Mr. VanFleet may be to the issue of post-1973 abandonment, (see Preliminary Matters), it is not strictly relevant to the issue of historic use of the claimed right, since the right as claimed in the adjudication process is based on pre-1973 use of the water. (See §85-2-212, MCA.)

31227-41F claims a total volume of 1,000 acre-feet of water per year for the entire right. This volume, divided by the claimed flow rate of 250 miner's inches, yields only 81 days of full-time use. This amount of time comes close to Mr. Foster's pattern of six sets of about ten days each, which also is the maximum historic use testified to on the record.

11. Witnesses for the Applicant and for the Objectors in this matter attempted to quantify the amount of return flow resulting from use of the water right in this matter. Unfortunately, since the lay witnesses did not quantify their estimates and the expert witnesses based their estimates on assumptions not clearly supported by the available evidence, it is not possible to arrive at any logical quantification of the return flow.

Applicant's witness Boyd VanFleet testified that he did not observe any runoff during the time he irrigated. He stated that he observed the erosion scars on the northeast edge of the SMOA bench (see Applicant's Exhibit 5) and thought they might possibly have been caused by irrigation or possibly by erosion connected with operation of the Economy Power generating plant and its ditch along the north side of the bench. (See markings in green on Applicant's Exhibit 5.) Mr. VanFleet, in response to questioning, stated that any runoff which did occur might run off the north, south, or east side of the bench, and might go directly back to Blaine Spring Creek. Mr. VanFleet also stated that he observed between two and five "seeps" next to Blaine

above it. Witness Glen Schultz stated that he believes the erosion scars were caused by power plant operations rather than irrigation use, and that he never observed runoff in the scars. Upon questioning, Mr. Schultz stated that runoff would go into Blaine Spring Creek (north of bench), Wigwam Creek (south), or into area ditches, and could reach the Madison River if the creeks were running. (Both witnesses testified that the creeks have gone dry above the river on various occasions.) As noted above in Finding of Fact 10, neither of these witnesses was present on the property during maximal use of the irrigation right.

Objector's witness Tom Lehman stated that he believes there wasn't any runoff to the east from his irrigation of the area (except when they blew a line), but that any return flow went into Blaine Spring Creek. Mr. Lehman also testified to "some" leakage occurring in the upper ditch. Witness Jim Foster testified that he saw evidence of return flows to Blaine Spring Creek, and that the area of flood irrigation (see Finding of Fact 10) produced a lot of runoff because the runs were short and the water was not changed often enough. Mr. Foster also discussed a wet "swale" area along the property boundary next to Blaine Spring Creek. In response to questioning, Mr. Foster agreed that the quantity of return flow was dependent on irrigation practices.

Objector Daems testified that substantial leakage from the diversion ditch below the point of diversion created "bogs". He

diversion ditch below the point of diversion created "bogs". He also testified that several draws down by Section 24 ran water from the bench back into Blaine Spring Creek over a number of years, and that there were a number of springs in the bottom of the canyon in Section 19 that are not there now. Mr. Daems stated that the sweet clover and other vegetation which used to grow on the edge of the bench above Blaine Spring Creek has disappeared, and that springs which used to be in evidence right above the creek have not been active for the last five to seven years.

Applicant's expert witness, Dr. Gerald Westesen, arrived at an estimate of 10% return flow. He stated that he believes this estimate is on the high side, and that there is "virtually no opportunity" for return flow, given the gravelly soil with an extremely high infiltration rate (as evidenced by the remains of closely spaced lateral ditches), the lack of pick-up ditches next to the fields, and the "highly fractured" nature of the underlying limestone layer. (Testimony; see also Applicant's Exhibit 7.) Dr. Westesen referred to logs of wells in the area (Applicant's Exhibit 8) which show fractured limestone is present, and stated that in his opinion the limestone underlying the historic place of uses is fractured and highly permeable and that therefore any water not consumed by the crops most likely would pass downward through the limestone and be lost.

Apart from Dr. Westesen's stipulated expertise (see Applicant's Exhibit 6), he has done a great deal of work in the

Madison Valley in general and on the Bar 7 Ranch in particular. (Testimony.) However, he specified under cross-examination that he does not know the geology underlying the SMOA bench and cannot be sure as to which direction the limestone layer trends, how fractured it is, nor whether it is underlain by less permeable material. Dr. Westesen, who testified that his visual inspection of the site did not show any springs or other evidence that water came out in seeps, also agreed that physical evidence of return flows would be affected by how much irrigation has occurred on the bench in recent years.

Objector MPC's expert witness, Kenneth Salo, estimated return flow at 50% of water in excess of crop needs, based on a low irrigation efficiency, slopes, the presence of erosion scars, and full fill materials in the Madison Valley. (Testimony; Objector's Exhibit 9.) Mr. Salo stated that he believes area streams would be "losing" streams if water was lost to deep percolation as described by Dr. Westesen.

To some extent, testimony by other witnesses supports Mr. Salo's suppositions regarding low irrigation efficiencies (e.g., Mr. Foster's descriptions of short runs and problems with getting the water moved often enough). However, as brought out on cross-examination, Mr. Salo also used some unsubstantiated and/or inaccurate information in arriving at his conclusions. For example, Mr. Salo used a USGS quadrangle map for the basis of his study, and did not consult the geological map available for the area. Further, Mr. Salo's report states that the limestone

layers most likely have a relatively low permeability (Objector MPC Exhibit 9, page 6, paragraph 1), while the USGS report which he quotes (Objector MPC Exhibit 13) suggests otherwise. Mr. Salo also stated that he was not aware of the Economy Power power station and ditch when he used the erosion scars to support his finding of historic surface return flows.

All in all, the evidence in this matter indicates that water use on the historic place of use resulted in return flows substantial enough to be noticed. Mr. Lehman and Mr. Foster have provided the best available information on historic use, and their testimony may be counted credible. In conjunction with Objector Daems, who is a lifelong resident of the area and an irrigator with great experience with water conditions on Blaine Spring Creek, and whose testimony therefore is entitled to great weight (see e.g., Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939)), they have testified to surface return flows to Blaine Spring Creek and to the presence of springs and seeps which indicate subsurface return flow. The estimates of Dr. Westesen, who did not consult with the historic water users and was not privy to the actual pattern of use on the bench (see discussion below) are not sufficient to counterbalance the testimony of the actual users. The much higher return flow estimated by Mr. Salo also cannot be accepted, since nothing presented by the witnesses or Mr. Salo himself supports this particular estimate. Department witness Scott Compton testified that he had never seen a return flow efficiency as high as 50%.

12. In the absence of a clearcut pattern of historic use and sufficient information to make a reasonable estimate of return flow, it is not possible to determine the consumptive water use of the past water use in order to compare it to the proposed use.

Dr. Westesen characterized the issues in this matter as (a) determining the past use of water and the past consumption of water, return flow, if any, and (b) comparing these factors on the historic and proposed places of use. (Testimony.) In regard to these factors, Dr. Westesen visited the historic and proposed places of use and evaluated the consumptive use of past and future crops, based on terrain factors, ditches, location or property, and soil.

Dr. Westesen determined that the historic irrigation was flood irrigation by means of Blaine Spring Creek water diverted into the main ditch, then into laterals, then into contour ditches. (Applicant's Exhibit 7, pp. 1 and 2.) This estimated use parallels Mr. Lehman's testimony, though it does not reflect the sprinkler irrigation mode on the place of use. Dr. Westesen then decided to use alfalfa as a benchmark crop, since it grows on the proposed place of use and was grown to some extent on the past place of use, and calculated net depletion for 279 acres of alfalfa.

However, several assumptions made by Dr. Westesen to calculate the net depletion do not appear to be supported by the evidence in the record, assuming arguendo that alfalfa is the

proper benchmark crop (Objector MPC contends that the testimony indicates an alfalfa/grass mix which requires a lower net irrigation requirement). Most importantly, Dr. Westesen uses the water right under review in this matter as the sole source of water to meet crop need and all system losses.

Dr. Westesen testified that Blaine Spring Creek, being virtually constant in flow and therefore a dependable source, would be used in preference to all other sources of water. However, as the evidence indicates, other sources of water were used on the place of use: several other water rights which were filed for the historic place of use (see MPC Exhibit 1) provide prima facie proof of their use thereon, and the uncontradicted testimony of past irrigators Foster and Lehman indicates use of Cold Spring Creek water and Wigwam Creek water on at least some portions of the bench. (See Finding of Fact 10, above.) Furthermore, the existence of other Blaine Spring Creek water rights for the historic place of use (see MPC Exhibit 1) suggests that Water Right No. 31227-41F was not the exclusive source of "dependable" water.

Second, Dr. Westesen assumed that the entire flow rate of 250 miner's inches was diverted constantly for 150 days. The volume which would be created by such a diversion exceeds the historic volume as claimed for Water Right No. 31227-41F by a factor of more than 1.87; in other words, result in a volume nearly double the claimed volume. Not only is Dr. Westesen's assumed pattern of use not reflected in the claim, it is not

supported by the testimony of the historic irrigators.

Since Dr. Westesen's assumptions with regard to the use of Water Right No. 31227-41F are not supported by the record, his calculations of net depletion and return flow are suspect, resting as they do on his initial assumptions about the use: his calculation of net depletion is premised on 150 days of continuous use, while his equation charges this one water right for the entire net depletion on the historic place of use. (See Applicant's Exhibit 7, page 5.) Dr. Westesen stated on cross-examination that water consumption on the place of use could not be allocated among the various appurtenant water rights without knowing the times and amounts of the other uses, and that he had not investigated any of the other rights. He agreed that calculations would show less return flow from this particular water right if all of the irrigation needs on the place of use were charged to the right.

Other assumptions which were made by Dr. Westesen include his use of 39% average irrigation efficiency and of 42% irrigation efficiency; figures based on Soil Conservation Survey information rather than information about actual irrigation practices. Dr. Westesen also arrived at an estimated return flow of 10% for the proposed place of use, presumably on the basis that soil conditions and other factors are similar (Applicant's Exhibit 7, page 3); however, he failed to discuss the widely recognized technical fact that sprinkler irrigation (especially with an efficient system such as that discussed) tends to yield

very little return flow.

Objector MPC's expert witness, Kenneth Salo, also made several assumptions unsupported by the evidence, including use of an irrigation efficiency of 35% based on measurements of "Flood irrigation projects located in Montana." (MPC Exhibit 9, page 5.) His most noticeable assumption is a return flow of 50%, based on his determination that the historic place of use was grossly over-irrigated and on his beliefs concerning the geology of the area. (See Finding of Fact 11.)

13. Boyd VanFleet testified that the Applicant has used Water Right No. 31227-41F on the proposed place of use for about eight years (to what extent was not specified), and that no one has ever objected to the use or the basis that it affects return flows. Mr. VanFleet did not specify whether anyone had objected to the use on other bases. However, testimony by the Objectors indicates that the use and/or change thereof has affected water conditions in Blaine Spring Creek.

Objector James Daems testified that flow reduction in Blaine Spring Creek has been gradual, with problems in water availability developing over the last few years since Bar 7 Ranch and Combs Cattle Company have expanded. He stated that his 1883 priority water right and his 1938 priority water right from Blaine Spring Creek used to be reliable but that the rights, especially the junior one, are not reliable water rights anymore. He stated that he believes this state of affairs is the result of changes in use of historic rights upstream on the creek.

Mr. Daems stated that he believes historic use on the SMOA bench made water available to him which is no longer available; first, through loss of return flow to the creek and loss of recharge by means of seeps and springs. Second, he testified that historically irrigators Foster and Lehman turned the water off frequently, resulting in water being made available for use downstream. Mr. Daems testified that upstream users are diverting more water than previously, and that he believes more water will be diverted in the future.

The Applicant argues that the effects experienced by Mr. Daems are the result of resuming the use of Water Right No. 31227-41F rather than expanding it; that Mr. Daems and other junior users have become accustomed to using the water right during the past years of sporadic use, but are not entitled to retain their windfall.

14. The record contains uncontradicted testimony that the Applicant in this matter has a possessory interest in the proposed place of use.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto. Title 85, Chapter 2, Part 4, MCA.

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the

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Hearing Examiner.

3. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria, set forth in §85-2-402, MCA, are met:

> (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
> (b) Except for a lease authorization pursuant to (§85-2-436) that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
> (c) The proposed use of water is a beneficial use.
> (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The Applicant has a possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 14.

5. The proposed use of water, irrigation, is a beneficial use of water. See §85-2-102(2), MCA.

6. In order to determine whether a proposed change in use of a water right will adversely affect the water rights of other appropriators, it is necessary to have evidence as to whether or not the proposed change will result in the consumption of volumes and flows in excess of the historic use or in a use pattern which differs from that established by practice, and whether or not any change in these factors will adversely affect other appropriators by changing the stream conditions.

The Applicant is correct that mere resumption of use of a water right, with an attendant increase of consumption to former

levels, does not constitute an increase in the burden on the source, assuming that the water right has not been abandoned. See In the Matter of the Application for Change of Appropriation Water Right No. G190495-41A by the United States of America, U.S. Fish and Wildlife Service (January 27, 1989 Proposal for Decision). Further, a change which results in somewhat different water conditions may be acceptable if the water rights of others are not adversely affected. See In the Matter of the Application for Change of Appropriation Water Right No. G34573-76H by Carrie M. Grether (September 10, 1986 Final Order). However, the use may not be resumed or changed in a manner which acts to the detriment of other appropriators.

Appropriators have vested rights to maintenance of the stream conditions which existed as of the time of their arrival on the source. Each appropriator develops a pattern of use based on the water available at any given time of the year, and invests time and money in developing irrigation, stockwatering, or other water uses which depend on the availability of a certain quantity of water at given times. An appropriator who has developed irrigation practices based on a senior appropriator's historic pattern of only using water in certain months, for example, might have to cease or radically alter his farming practices if the senior user was allowed to extend his use year-round. For a full discussion of the right to maintenance of stream conditions, see In the Matter of the Application for Beneficial Water Use Permit No. 20736-41H by the City of Bozeman and In the Matter of the

Application to Sever or Sell Appropriation Water Right No. 20737-s41H by the City of Bozeman, Memorandum to the June 4, 1984 Proposal for Decision; In the Matter of the Application for Authorization to Change Existing Water Right No. 9782-c76M by Thomas and Linda Bladholm, June 22, 1984 Proposal for Decision.

A Statement of Claim for Existing Water Right, such as that filed by the Applicant's predecessor, defines the maximum flow rate and volume which historically have been diverted. However, they do not provide any information as to how much of the diverted water was consumed pursuant to the historic use, or the historic pattern of use within the outside parameters of the claimed period of appropriation. Therefore, when Objectors to a change allege that the proposed change will increase the demands on the stream over those made by the historic use, or will otherwise adversely affect their water rights by altering stream conditions, the Applicant must provide evidence which allows the impact of the proposed change(s) to be assessed by comparing the effects on the water source and other appropriators caused by the historic use with those caused by the proposed use.

To the extent that the impact of the proposed changes cannot be evaluated, the Department cannot grant a change authorization. As a result, the Department has had to deny or only partially grant proposed changes which arguably could have been authorized in whole if the Applicants had introduced evidence sufficient to allow the Department to find no adverse effect (or alternatively, that a change authorization could be conditioned so as to protect

other appropriators). See generally In the Matter of the Application for Change of Appropriation Water Right No. G15928-76H by Samuel T. and Virginia Allred, June 8, 1989 Proposal for Decision; In the Matter of the Application to Sever and Sell Appropriation Water Right No. U111165-76H by William A. and Eva I. Worf and the Application to Sever and Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown.

In the present matter, the Applicant is insistent that the Department must rely on the Claim for Existing Water Rights and its attendant documentation when defining historical use, and that the Department may not "pierce the veil" by delineating the right in terms other than those provided in the claim. See e.g., Applicant's brief in reply to Objector MPC's post-hearing brief, page 15 et seq.

However, the Department on numerous occasions has asserted its authority to make those inquiries necessary to complete its statutory obligation to determine if the criteria have been met, including inquiries concerning the effect of the historic pattern of use on stream conditions. The Department does not thereby assert jurisdiction to modify the underlying water right, nor does its determination have any res judicata effect. The water right holder retains the entire water right and the ability to use it as it is defined in the claim. Therefore, there is no property loss as suggested by the Applicant. See e.g., Preliminary Matters; In the Matter of the Application for Change of Appropriation Water Right Nos. G05081 and G05083 by Neil M.

Moldenhauer, March 20, 1984 Final Order. Rather, the result of denying a change where insufficient evidence exists to allow a finding of no adverse effect is to provide maximum protection of the parties. The water right holder retains the right as claimed and holders of other water rights are protected, whereas granting a change authorization under such circumstances may result in severe or irreparable harm to the other users on the source.

7. The Applicant has not met its burden of proof on the issue of adverse effect in this matter.

An applicant's initial burden of production on this criterion is met if the applicant provides substantial credible evidence that the proposed change(s) will not increase the burden on the source. In the absence of objections or other contrary evidence, a correct and complete application is usually sufficient to meet the burden, if it sets forth the kind and character of the intended change(s). Any objectors then have the burden of production concerning the utilization of their water rights and how the proposed change(s) as set forth by the Applicant may adversely affect these rights. In the present matter, the Applicant discharged its initial burden of production by introducing the Application, Statement of Claim for the underlying water right, and the testimony of witnesses. The Objectors discharged their burden of production by describing their water rights and offering a plausible argument that the proposed changes would cause adverse effect to their rights. See generally U.S. Fish and Wildlife Service, supra; In the Matter of

the Application for Change of Appropriation Water Right No. G155812-43A by Rogerric and Karen Knutson, February 27, 1989 Proposal for Decision; In the Matter of the Application for Change of Appropriation Water Right Nos. 101960-41S and 101967-41S by Keith and Alice Royston, November 15, 1989 Final Order.

Once these initial burdens have been met, the Applicant has the final burden of proof (the burden of persuasion) on all issues set forth in §85-2-402, MCA. On the issue of adverse effect to other water rights, the Applicant must produce persuasive evidence that the proposed changes will not create the alleged additional burden on the source. (See discussion under Conclusion of Law 6, supra.)[3]

In the present matter, the Objectors allege that the Applicant will place an additional burden on the stream by reducing return flows which make up part of the Objectors' water supply. (See Findings of Fact 11 and 12.) The Applicant responds by alleging variously that there is no evidence that the historic use of Water Right No. 31227-41F ever resulted in return flows (Applicant's post-hearing brief, page 7), that any water which came off the bench was waste water rather than return flow (Applicant's post-hearing brief, pp. 8 and 9), and that there is

[3]The burden on the source is the depletion of the source due to the exercise of the water right, and may not be increased by means of a change, since an increase would not be part of the historic use right but a new appropriation. The result would adversely affect junior appropriators by "a posteriori creating another right superior to theirs--a result entirely contrary to the doctrine of prior appropriations." See Worf, supra, July 7, 1986 Proposal for Decision, page 18.

no evidence before the Hearing Examiner as to the amount of return flows and the Hearing Examiner is not entitled to pick a return flow quantification "out of the air." (Applicant's closing statement at the hearing in this matter.)

Contrary to the Applicant's assertions, there is substantial evidence that historic use of Water Right No. 31227-41F resulted in both surface and subsurface return flows. In addition to the Objectors' own testimony, there is testimony by the historic irrigators themselves, testimony by Applicant's witness who observed seeps, and testimony by expert witnesses. (Although Applicant's expert witness did assign a minimal number to the return flow, he did not entirely discount it. Further, he agreed that various unconsidered factors could affect the return flow quantification.) See Findings of Fact 11 and 12. There is also evidence that some portion of these waters made it back to the Blaine Spring Creek source, and as such constitute return flow rather than waste water.[4]

The Applicant is correct in its assertion that the record in this matter does not provide sufficient evidence to allow a quantification of the return flow to be made. See Finding of Fact 11. However, the inability to quantify the return flow does not result in a finding that the criterion regarding adverse

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[4]"Return flow" and "waste water" both are categories defining waters which have been diverted by an appropriator but which are "left over" at the end of the appropriator's water distribution system. However, waste water is leftover water which does not and would not rejoin the source of supply, while return flows do or would return to the source of supply. For a discussion of the comparison, see Knutson, supra, at page 21.

effect has been met and a change authorization may be granted; to the contrary, it results in a determination that the Applicant's burden of persuasion has not been met. The Applicant's failure to address the question of how use of the water right by an efficient means of sprinkler irrigation on the proposed place of use will result in the same return flow as the historic use, underlines the Applicant's failure to carry the burden of persuasion on the issue of return flows. See Finding of Fact 12.

The Objectors in this matter also allege that the proposed changes will result (in fact, have already resulted) in more water being diverted from Blaine Spring Creek pursuant to this water right. See Finding of Fact 13. The record reflects that the portion of Water Right No. 31227-41F under review herein historically irrigated approximately 112 acres (that part of the historical place of use proportionate to the 2/5 of the water right involved), while the proposed use will cover 70.5 acres of new irrigation and 670.5 acres of supplemental irrigation. (See Finding of Fact 6.) Further, the Applicant proposes to use the right constantly throughout the irrigation season. (See Finding of Fact 8.) However, as discussed in Finding of Fact 12, there is no basis either in the Statement of Claim or in the testimony concerning historic use to support allowing the right to be used for the full irrigation season. Such management would result in a diversion of far more than the allowable volume, increasing the burden on the source.

Assuming arguendo that the Applicant can measure the flow

rate of this water right among the other rights being diverted through the same ditch, the Applicant might be able to substantially duplicate the historic volume of water by proper management and measurement. See In the Matter of the Applications for Change of Appropriation Water Right Nos. G136329-41O, G136330-41O, and G136331-41O by Lloyd Debruycker, September 22, 1988 Final Order. However, the Applicant did not provide any evidence on how the water right could be managed so as not to increase the burden on the source due to diverting the flow rate for a longer period of time than is supported by the evidence on historic use. The Department does not have sufficient information to develop a proposed management plan so that the change authorization might be granted with conditions.

In summary, the Applicant failed to meet its burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators, and thereby has failed to show that the proposed changes will not adversely affect the water rights of other persons.

8. The Applicant has provided substantial credible evidence that the proposed means of diversion and construction of the appropriation works are adequate. See Finding of Fact 8. However, as discussed above, it has failed to provide sufficient evidence that the proposed means of operation is adequate to prevent adverse effect to other appropriators.

9. If, upon review by the Department at the Final Order

stage or by the appropriate district court upon appeal, it is determined that the Hearing Examiner's proposed decision must be amended or reversed, further evidence will be needed on several issues. In such an event, therefore, the matter should be remanded so that the necessary information may be obtained. In denying the Application for Change at this point, the Hearing Examiner does not purport to have determined that the proposed changes could not be authorized, given sufficient credible evidence and an adequate plan of management.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Change of Appropriation Water Right No. G(W)31227-41F by T-L Irrigation Company is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration

of timely exceptions, responses, and briefs.

Dated this 31st of July, 1990.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 27th day of ~~July~~ AUGUST, 1990, as follows:

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